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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JOE CARRILLO, Defendant and Appellant.	D049607 (Super. Ct. No. FSB039094)

APPEAL from a judgment of the Superior Court of San Bernardino County, Donna G. Garza, Judge. Affirmed as modified.

Joe Carrillo was convicted by a jury of one count of aggravated assault (Pen. Code,[1] § 245, subd. (a)(1)) and four counts of attempted premeditated and deliberated murder (§§ 187, subd. (a), 664). True findings were made that all the crimes were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)), Carrillo personally used a knife to commit the aggravated assault (§ 12022, subd. (b)(1)), and during the attempted murders, a principal intentionally discharged a firearm resulting in

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1 All statutory references are to the Penal Code unless otherwise specified.

great bodily injury to one of the victims (§§ 12022.53, subds. (b), (c), (d), & (e)(1), 12022.5, subd. (a)(1)). Carrillo was sentenced to a determinate term of nine years followed by an indeterminate term of 160 years to life.

Carrillo contends hearsay statements indicating he was not present at the shootings were improperly excluded, instructions on a "kill-zone" theory were legally insufficient, unanimity instructions were improperly omitted and the deadly weapon enhancement attached to the aggravated assault charge should be stricken.[2] We agree the deadly weapon enhancement should be stricken but in all other respects affirm the judgment.

FACTS

Aggravated Assault

On March 27, 2003, at about 3:30 p.m., Carrillo and his friends drove up behind Francisco Lopez (Francisco)[3] who was traveling on a scooter. Francisco and Carrillo lived in the same neighborhood; their homes were within an eighth of a mile of each other. Francisco had not had problems with Carrillo in the past. Carrillo and his friends got out of their car and approached Francisco. Carrillo pulled a knife out of Francisco's pocket, tried to stab Francisco but Francisco jumped back. Carrillo then punched

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2 In his opening brief, Carrillo contended the court erred in failing to specifically instruct the jury on the burden and standard of proof with respect to the theory of self-defense, which was his defense to the aggravated assault theory. In his reply brief, he withdrew this argument since, as the Attorney General points out, the court did instruct the jury on this issue (CALJIC No. 9.00).

3 At times we use first names to distinguish parties with the same last name.

Francisco in the face. Carrillo said, "You ratted on me," which was a reference to a stolen motorcycle. During the confrontation, one of Carrillo's friends tried to grab Francisco's arm, but when they saw the blood coming from his head, they all got in the car and left. As Carrillo drove away, he held up his right hand as if he were holding a gun and said, "I was gonna get you, mother-fucker."

Francisco quickly went to his home, which was about two blocks away. He reported the assault to the police, naming Carrillo as his assailant.

A sheriff's deputy spoke with Carrillo by telephone. Carrillo stated he was out walking a dog with a friend when he saw Francisco. He yelled to Francisco and asked him why he was sending "the dude from Delmann Heights to my house?" Delmann Heights Bloods is a criminal street gang and Carrillo was a member of the rival West Side Verdugo criminal street gang. According to Carrillo, the Delmann Heights gang member was upset about having his motorcycle stolen and Francisco directed him to Carrillo's house. In response to Carrillo's question about the Delmann Heights "dude," Francisco wanted to "get rowdy" with Carrillo, that is, fight him, and started reaching for his knife. Carrillo hit Francisco one time, Francisco dropped the knife and Carrillo "grabbed" it.

Carrillo told the deputy that school had just ended for the day and many people saw him acting in self-defense. He declined, however, to provide the names of any witnesses, including the friend he had been with at the time he confronted Francisco.

Attempted Murders

On March 29, 2003, at about 8:30 p.m., two days after the assault, Carrillo and several others went to Francisco's house. Francisco was outside the house when he heard noises and saw someone approaching the fence. He heard someone call his name and, from a distance of about five feet, he saw Carrillo at the fence line. Carrillo pulled out a gun and said, "I was gonna get you, mother-fucker." Carrillo ran out into the street and started firing while Francisco ran back to the house. Five or six gunshots were fired and Carrillo left in a car.

Francisco's mother, father, and sister had also come outside the house before the shots were fired because they had heard voices outside, and within seconds of going outside, the shooting started. None of them were able to identify the shooter because it was too dark and they saw only muzzle flashes. Francisco's sister was shot in the back of the neck. She was hospitalized for six days and because her jaw was shattered, her mouth was wired shut for over seven weeks. Not all the bullet fragments could be removed. She was not fully recovered at the time of trial and was in constant pain.

The day after the shooting, the family sent Francisco and one of his brothers to live with an aunt in San Diego. They also put their house on the market, sold it, and moved away.

There were some inconsistencies between the versions of the shooting given by Francisco and the members of his family. For example, Francisco told the police that when the first shots were fired, he was the only person outside and then almost immediately thereafter he was joined by his mother, father and sister. At trial, Francisco

stated that when he saw Carrillo he ran back into the house, grabbed a phone and when he came back outside, his sister had been shot. His father and sister testified that Francisco was already outside when the shots were fired.

Gang Evidence

Carrillo raises no issues involving the criminal street gang enhancements and therefore a detailed recitation of the evidence is not necessary. Suffice it to say, there was evidence showing Carrillo was a member of the West Side Verdugo criminal street gang, which had been involved in prior shootings. The Delmann Heights Bloods was a rival criminal street gang. In gang culture, a "rat" or "snitch" is despised and often the victim of retaliation. As a member of the gang, Carrillo was expected to "take care of that rat," that is, a person like Francisco who had told a rival gang member about Carrillo possessing a stolen motorcycle. Therefore, Carrillo committed the crimes for the benefit of himself and the West Side Verdugo gang.

DISCUSSION

I

Exclusion of Hearsay Statements

Carrillo contends the court erred in excluding statements by Jaclyn Lopez (Jaclyn), who invoked her Fifth Amendment right not to testify. He contends her statements were admissible under the hearsay exception for statements against penal interest and were reliable.

Jaclyn's Statements

On April 18, 2003, Jacyln met with an investigator from the public defender's office. The investigator asked her if she knew Carrillo and if she was aware there was a shooting in the area on March 29, 2003. She stated she knew Carrillo and knew that he was not present at the shooting. Jaclyn initially denied having any direct knowledge of the shooting, stating she had been "*told* Anthony was involved in the shooting" (italics added) but then admitted she had been present. She stated she had picked up Anthony at a friend's house and, at his request, had driven him to a location where he got out of the car. She did not remember the time, but knew it was dark. She told the investigator she did not know what was going on. She heard several gunshots. Anthony then ran back to the car and told her to drive "to a girl's house." Anthony told her he had used a gun but did not tell her he had shot someone. She knew there had been a confrontation but did not know what it was about and did not know anyone had been shot. She stated Carrillo was not with them during the evening and she had no knowledge of where he was at the time of the shooting. Jaclyn stated the car she was driving belonged to her mother. She no longer had possession of the car; the car was now in her sister's possession and she did not know where her sister lived.

Jaclyn's Assertion of her Fifth Amendment Right and the Court's Ruling

Out of the presence of the jury, Jaclyn was called to the stand and asked if she would assert her Fifth Amendment privilege against incrimination as "to any questions asked regarding the incident." She asserted her Fifth Amendment privilege and the court declared her unavailable as a witness. The court ruled the public defender's investigator

could not testify as to Jaclyn's statements because there was no indicium of reliability. The court observed that Jaclyn was one of Carrillo's girlfriends. The court also noted Jaclyn's statements indicating Carrillo was not present were not against her penal interest. Defense counsel suggested recalling Jaclyn to see if she would be willing to testify about her knowledge that Carrillo was not present at the shooting. The court rejected the suggestion, noting that both counsel had asked Jaclyn if she would be willing to answer "any questions" about the incident and she had answered "no." The court stated it was not going to recall her to decide which of her statements were against penal interest and to have "a trial within a trial."

Analysis - Declaration Against Penal Interest

"Under one of the statutory exceptions to the hearsay rule, a party may introduce in evidence, for the truth of the matter stated, an out-of-court statement by a declarant who is unavailable as a witness at trial if the statement, when made, was against the declarant's penal, pecuniary, proprietary, or social interest." (*People v. Cudjo* (1993) 6 Cal.4th 585, 606-607 (*Cudjo*); Evid. Code, § 1230.[4]) "[I]n order to qualify for admission, '[t]he proponent of such evidence must show that the declarant is unavailable,

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4 "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected [the declarant] to the risk of civil or criminal liability, or so far tended to render invalid a claim by [the declarant] against another, or created such a risk of making [the declarant] an object of hatred, ridicule, or social disgrace in the community, that a reasonable [person] in [the declarant's] position would not have made the statement unless [the declarant] believed it to be true." (Evid. Code, § 1230.)

that the declaration was against the declarant's penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character.' " (*People v. Brown* (2003) 31 Cal.4th 518, 535; *People v. Duarte* (2000) 24 Cal.4th 603, 610-611.)

"Hearsay is generally excluded because the out-of-court declarant is not under oath and cannot be cross-examined to test perception, memory, clarity of expression, and veracity, and because the jury (or other trier of fact) is unable to observe the declarant's demeanor. [Citations.] Because the rule excluding hearsay is based on these particular difficulties in assessing the credibility of statements made outside the jury's presence, the focus of the rule's several exceptions is also on the reliability of the out-of-court declaration. Thus, the various hearsay exceptions generally reflect situations in which circumstances affording some assurance of trustworthiness compensate for the absence of the oath, cross-examination, and jury observation." (*Cudjo, supra,* 6 Cal.4th at p. 608.)

As a preliminary fact, the trial court must determine whether the declarant actually made the statement as represented and whether the statement meets certain standards of trustworthiness. (*Cudjo, supra,* 6 Cal.4th at p. 608.) In determining the trustworthiness of a statement, the "trial court 'may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.' " (*Id.* at p. 607; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 334.) "[A]ssessing trustworthiness ' "requires the court to apply to the peculiar facts of the individual case a broad and deep acquaintance with the ways human beings actually conduct themselves in the circumstances material under the

exception." ' " (*People v. Duarte, supra,* 24 Cal.4th 603, 614, quoting *People v. Frierson* (1991) 53 Cal.3d 730, 745.)

"Determination of whether a statement is trustworthy is entrusted to the sound discretion of the trial court. In reviewing the trial court's rulings we apply the abuse of discretion standard." (*People v. Greenberger*, *supra*, 58 Cal.App.4th at p. 335.)

Here, Jaclyn was unavailable as a witness because she had asserted her Fifth Amendment privilege not to testify. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1251, overruled on another ground in *People v. Edwards* (1991) 54 Cal.3d 787, 833-835.) Part of her statement was against her penal interest, that is, her statement that she drove the shooter to and from the scene. This statement could subject her to criminal liability as an aider and abettor or an accessory after the fact. Jaclyn's statement, however, also minimized her involvement. She initially stated only that she had been told Anthony was involved in the shooting. She then admitted being present, but stated when she drove Anthony to the location, she did not know what was going on, she did not hear any screaming or conversations before the shooting, she did not know how many gunshots she heard, Anthony did not tell her anybody had been shot, and she did not know the present location of the car she drove. In other words, while her statement clearly implicated Anthony, Jaclyn played down her own involvement, stressing her ignorance of the situation. Under these circumstances, it is not entirely clear that Jaclyn understood she was making a statement that could subject her to criminal liability. We further note she made these statements not to the police, but to an investigator from the public defender's office who was representing Carrillo.

Jaclyn's minimization of her involvement and the real possibility she was unaware that she could be subjected to criminal liability are factors making her statement less trustworthy. (Compare *People v. Duarte, supra,* 24 Cal.4th 603, 614-615 [statement although incriminating was also an attempt to shift blame or curry favor and thus untrustworthy]; see also *People v. Greenberger*, *supra,* 58 Cal.App.4th at p. 335 [a statement "is least reliable in that portion which shifts responsibility"]; 1 Witkin, Cal. Evidence (4th ed. 2000) Hearsay, § 146, p. 857 [to be admissible, statement must be "so far contrary to the declarant's interests 'that a reasonable [person] in [this] position would not have [admitted it] unless he [or she] believed it to be true' "].)

Jaclyn also had no details about the shooting. She did not know what time it occurred; she only remembered that it was dark. She did not describe the location, did not mention anybody coming out of the house, did not remember any screaming or conversations, and did not specify where Anthony was located during the shooting. The lack of details was another factor undermining the trustworthiness of her statement. Finally, the trial court noted and it is undisputed that Jaclyn was one of Carrillo's girlfriends and thus she had a strong motive to lie to protect Carrillo.

Under these circumstances, we find no abuse of discretion by the trial court in finding Jacyln's statement Anthony was the shooter, while against penal interest, was not sufficiently trustworthy to be admitted into evidence.

As to Jaclyn's statement that Carrillo was not present during the shooting, the trial court found this not to be a statement against her penal interest. We agree. Therefore, it was not admissible under Evidence Code section 1230. Even assuming arguendo that the

statement was against her penal interest because it was inextricably bound to her statement admitting her presence at the shooting, we would not reverse since, as we noted above, the court acted within its discretion in concluding Jaclyn's statements were not sufficiently trustworthy to merit admission.

Analysis - Denial of Right to Present a Defense

Carrillo also contends that exclusion of Jaclyn's statements resulted in a denial of due process and a right to present a third party culpability defense.

As the Attorney General points out, Carrillo waived this issue by failing to raise it below. (*People v. Williams* (1997) 16 Cal.4th 153, 250.) Moreover, even if the issue were not waived, we would not reverse.

" 'A criminal defendant has a right to present evidence of third party culpability if it is capable of raising a reasonable doubt about his own guilt. The rule does "not require that any evidence, however remote, must be admitted to show a third party's possible culpability." ' " (*People v. Panah* (2005) 35 Cal.4th 395, 481; *People v. Fudge* (1994) 7 Cal.4th 1075, 1103.)

Untrustworthy hearsay evidence is not capable of raising a reasonable doubt. Thus, there was no constitutional violation.

II

Instructions on the Kill Zone Theory

The trial court instructed the jury on a "kill zone" theory for attempted murder using CALJIC No. 8.66.1:

> "A person who primarily intends to kill one person, may also concurrently intend to kill other persons within a particular zone of risk. [This zone of risk is termed the 'kill zone.'] The intent is concurrent when the nature and scope of the attack, while directed at a primary victim, are such *that it is reasonable to infer* the perpetrator intended to kill the primary victim by killing everyone in that victim's vicinity.
>
> "Whether a perpetrator actually intended to kill the victim, either as a primary target or as someone within a ['kill zone'] [zone of risk] is an issue to be decided by you." (Original brackets, italics added.)

Carrillo, while not disputing that criminal liability may be based on a kill zone theory (see *People v. Bland* (2002) 28 Cal.4th 313, 330-331), argues CALJIC No. 8.66.1 "invited a legally insufficient method to convict." He contends: "It is not enough that the evidence makes it *reasonable to infer* the intent to kill every bystander. The evidence must be such that the jurors *actually do infer* the intent to kill others. Only then is the assailant's intent 'concurrent.' Intent is not concurrent just because the circumstances make such an inference 'reasonable.' " He argues the instruction misinstructed the jury on an element.

The trial court has a duty to instruct the jury on general principles of law which are closely and openly connected with the evidence and which are necessary to the jury's understanding of the case. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.) "In determining whether an instruction interferes with the jury's consideration of evidence presented at trial, we must determine 'what a reasonable juror could have understood the charge as meaning.' " (*People v. Garrison* (1989) 47 Cal.3d 746, 780; *People v. Fonseca* (2003) 105 Cal.App.4th 543, 549.) We view instructions in light of the instructions as a whole to see if the jury received a correct interpretation of the law; error will not be

found based on isolated phrase, sentence or excerpt. (*People v. Gomez* (1986) 183 Cal.App.3d 986, 992; *People v. Frye* (1998) 18 Cal.4th 894, 957.) We assume the jurors are intelligent and are capable of understanding, correlating, and applying all the instructions given to them. (*People v. Ayers* (2005) 125 Cal.App.4th 988, 997.) Further, "[a]s Chief Justice Rehnquist ha[d] observed: 'Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.' " (*People v. Williams, supra,* 40 Cal.App.4th at p. 457.)

Here, Carrillo focuses on an isolated phrase in an instruction and gives it an unduly narrow and unintended meaning that would not be adopted by an ordinary jury in the context of CALJIC No. 8.66.1 or in light of the instructions as a whole. CALJIC No. 8.66.1 does not merely tell the jury that the intent is concurrent if "it *is reasonable to infer* the perpetrator intended to kill the primary victim by killing everyone in that victim's vicinity," it also directs the jury that "[w]hether the perpetrator *actually intended* to kill the victim, either as a primary target or as someone within the ['kill zone'] [zone of risk] is *an issue to be decided by you*." (Original brackets, italics added.) In other words, CALJIC No. 8.66.1, reasonably interpreted, tells the jury not only that they must determine whether a concurrent intent is reasonable but also whether the defendant actually had such an intent.

Further, CALJIC No. 8.66.1 must be viewed in light of the whole charge, which included telling the jury that it was required to find a joint union of the act and a certain specific mental state (CALJIC No. 3.31); that if there were two reasonable interpretations of a mental state, the interpretation pointing to its absence must be adopted (CALJIC No. 2.02); and that the prosecution had the burden of proving guilt beyond a reasonable doubt on each element of the crime (CALJIC Nos. 2.90, 2.91). When CALJIC No. 8.66.1 is viewed in light of the instructions as a whole, there is not the remotest possibility the jury would have adopted the strained interpretation urged by Carrillo, that is, as permitting it to return a guilty verdict if it found that a concurrent intent inference was reasonable even though it rejected the inference.

The jury here was not given legally insufficient instructions or misinstructed on an element of an offense.

III

Unanimity Instructions

Carrillo contends his conviction for aggravated assault must be reversed because the court failed to give a unanimity instruction, that is, an instruction telling the jury it must unanimously agree on the act that constituted the assault. He contends that without the unanimity instruction, the jurors might not have unanimously agreed on whether the assault occurred because he punched Francisco or because he tried to stab him.

An aggravated assault is committed when the defendant commits an assault either by using a deadly weapon or by using force likely to produce great bodily injury. (§ 245, subd. (a)(1).)

A defendant in a criminal trial has a constitutional right to a unanimous jury verdict. (Cal. Const., art. I, § 16.) Where the evidence shows more than one offense occurred, the court must tell the jury it must unanimously agree on at least one of the offenses involved in order to convict. (*People v. Madden* (1981) 116 Cal.App.3d 212, 219.) The danger in failing to give a unanimity instruction is that a conviction may be returned even though not all the jurors are convinced beyond a reasonable doubt that the defendant committed any one offense shown by the evidence. (*People v. Epps* (1981) 122 Cal.App.3d 691, 701-703.)

A unanimity instruction is not " 'required, however, if the case falls within the continuous course of conduct exception. This exception arises in two contexts. The first is when the acts are so closely connected that they form part of one and the same transaction, and thus one offense. [Citation.] The second is when . . . the statute contemplates a continuous course of conduct of a series of acts over a period of time.' " (*People v. Avina* (1993) 14 Cal.App.4th 1303, 1309.) "The 'continuous conduct' rule applies when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them." (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100.)

Here, although Carrillo both stabbed at and punched Francisco, both acts were part of one continuous assault and therefore the case appears to fall under the continuous course of conduct exception. The circumstances of Carrillo's case are not dissimilar to those in *People v. Jefferson* (1954) 123 Cal.App.2d 219. In *Jefferson*, the police responded to a domestic violence call. While in the doorway of the house, the defendant

had a butcher knife in her hand, told the police they would have to use a gun to get the knife, and slashed at a group of officers around her who were trying to disarm her. One officer was so close to her that his sleeve was cut. When an officer accused the defendant of not being married, she offered to show him her marriage license, and went inside the house followed by some of the officers. She put down the butcher knife. One of the officers grabbed the butcher knife, but defendant pulled a pocket knife out of her purse and began slashing at the officers. During the ensuing struggle, one of the officers was cut in the hand. The whole episode lasted 10 to 15 minutes. (*Id*. at pp. 219-221.) The *Jefferson* court rejected defendant's argument there were two offenses and the prosecutor was required to elect which act formed the basis of the offense, holding there was but one transaction that, as a whole, constituted one offense. (*Ibid*.) Similarly, here, there was one continuous transaction occurring over a short period of time. The different acts of punching and stabbing at Francisco were part of a single assault.

It is true that Carrillo offered slightly different defenses. He claimed he hit Francisco in self-defense while he denied trying to stab him. However, both these defenses involved no more than a credibility issue, that is, whether the jury believed Carrillo's version of what occurred or Francisco's version. There were no other witnesses who testified as to what occurred, and it was a simple choice of who to believe. Although there were some inconsistencies in Francisco's account of the assault, for example, as to the number of people who were with Carrillo or the type of car Carrillo and his friends were using, Francisco was consistent in stating Carrillo both tried to stab

him and punched him. As a practical matter, there was no basis for the jury to accept that Carrillo committed one act, but not the other.

Furthermore, a note from the jury and the jury verdict indicate that the jurors unanimously agreed Carrillo tried to stab Francisco. The aggravated assault count contained a section 12022, subdivision (b)(1) allegation that Carrillo personally used a deadly weapon during the assault. The jury submitted a note asking if the deadly weapon had to be a knife. The court answered yes. The jury returned a true finding on the personal use of a deadly weapon allegation, thus indicating the jury found Carrillo tried to stab Francisco.

Carrillo asserts that the true finding on the deadly weapon allegation does not necessarily mean the jurors unanimously agreed he tried to stab Francisco. He argues the jury could have found he merely brandished the knife, an act that is sufficient to prove the use of a deadly weapon under section 12022, subdivision (b)(1), but not sufficient to prove an aggravated assault based on an assault with a deadly weapon theory. (See *People v. Wolcott* (1983) 34 Cal.3d 92, 102.) This argument is unpersuasive since there was no evidence presented to show Carrillo merely brandished the knife, nor was this theory presented to the jury. Carrillo's argument rests on nothing more than unfounded speculation.

IV

Striking Firearm Allegation

Carrillo contends the section 12022, subdivision (b)(1) deadly weapon enhancement attached to the aggravated assault count must be stricken because weapon

use was an element of the aggravated assault. (See *People v. Summersville* (1995) 34 Cal.App.4th 1062, 1070 ["A conviction under section 245, subdivision (a)(1) cannot be enhanced pursuant to section 12022, subdivision (b)"].) The Attorney General concedes the deadly weapon enhancement should be stricken. We agree. As we explained in part III, *ante*, the jury's verdict reflects the jury found Carrillo used a deadly weapon in committing the aggravated assault.

DISPOSITION

The section 12022, subdivision (b)(1) enhancement attached to the aggravated assault count is ordered stricken and the trial court is directed to amend the abstract of judgment and to send a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

MCCONNELL, P. J.

WE CONCUR:

BENKE, J.

HALLER, J.